United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2684

To be argued by
KENNETH R. FEINBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2684

UNITED STATES OF AMERICA,
Appellee,

—v.—

GILBERT FISHER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Gilbert Fisher appeals from a judgment of conviction entered on December 6, 1974, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury, and from the denial of his motions for a judgment of acquittal, a new trial and dismissal of the indictment, entered on November 26, 1974.*

Indictment 74 Cr. 388, filed on April 11, 1974, charged the defendant in four counts with evading his personal income taxes for the years 1967 through 1970, in violation of Title 26, United States Code, Section 7201.

* On February 5, 1975, this Court ordered that the appeals from the judgment of conviction and the denial of the defendant's motions be consolidated.

The first trial commenced on September 9, 1974 before Judge Weinfeld and a jury, and on September 19, 1974 the jury informed the Court that it was unable to reach a verdict. A new trial was immediately scheduled for November 4, 1974. The second trial commenced on November 4 before Judge Weinfeld and a jury and concluded on November 8, 1974, when the jury returned a verdict of guilty on all four counts. On November 26, 1974, the defendant's motion for a new trial was denied.

On December 6, 1974, Judge Weinfeld sentenced Fisher to concurrent fifteen months terms of imprisonment on each of the four counts and imposed a total committed fine of $10,000. The defendant is on bail pending this appeal.

Statement of Facts

A. Pre-Trial Proceedings

At the first trial, which commenced on September 9, 1974, the defendant was represented by Gilbert S. Rosenthal, Esq. On September 19, 1974, the jury informed the Court that it was unable to reach a verdict. In dismissing the jury, Judge Weinfeld stated to the jurors that:

> "I would be less than frank if I didn't say to you that the failure to reach a verdict in this case is disappointing.
>
> In my view, the evidence was very substantial, and the issue was very simple, *which would have permitted a verdict one way or the other, whichever way it went.*
>
> *The Court would have no view or judgment as to your determination once you decided it.* * * *
>
> As I say, there are a number of cases where I very readily could understand disagreement, but in a

> case where the issues are simple, clean-cut, and the evidence substantial, it would seem to me that a reasoned approach *would have permitted a verdict of guilty or not guilty in this case without question.*" (R. 5-6; emphasis supplied).*

The District Court offered to retry the case in three or four days but, after defense counsel objected claiming other commitments, it immediately set down the retrial of the case for November 4, 1974, noting that the new date gave both sides "ample time to get ready." (R. 7.)

Thereafter, Fisher decided to substitute a new attorney for the retrial, and so informed the District Court on October 7, 1974 (R. 8). On October 9, 1974, almost one month before the retrial, and just two days after being informed of the substitution, Judge Weinfeld advised both sides in writing that while the substitution would, of course, be permitted it could not

> "serve as an excuse to postpone the trial presently scheduled for November 4, 1974. There is ample time to obtain a new attorney, and the Court directs that all parties be ready for the retrial of this case on November 4 (R. 10)."

On October 21, 1974, both sides appeared before Judge Weinfeld for a pretrial conference. At that time, Fred Wallace, Esq. announced that he would probably represent the defendant at the retrial, but informed the District Court that there was a question as to whether he could be prepared to proceed with the trial on November 4 (R. 31-32). Judge Weinfeld immediately replied (R. 32-33):

> "I made it perfectly clear in my memorandum that my calendar is set up on a very tight schedule. I was prepared when the jury returned in disagree-

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* References to "R." refer to the record below made part of the appellant's appendix.

ment to put the case down, as a matter of fact, within three or four days thereafter, and I think it was at Mr. Rosenthal's urging, because he had some other matter in the state court, that I put it over to November 4th.

When I received the notice that Mr. Fisher desired to have other counsel, which I say is his right, but it doesn't encompass a right to postpone a case, it occurred to me it was almost a month from the date I fixed the trial, and I did not want any delay, and I was giving ample notice that a month's time, in terms of my experience and my particular experience with this case, is more than ample for full preparation, and I am prepared to say to you now that even as of today, if a lawyer came in fresh without knowing anything about this case, there is ample time to go ahead on November 4th.

Now, my calendar is tight. It is back to back. I have carved out the time for the trial, and the case will go ahead that morning. There is nothing extraordinary about the case" (R. 32-33).

The District Court concluded by noting that, "I have sat through the case. It is a perfectly simple case." (R. 33-34.)

On October 25 another pretrial conference was held. At this conference Mr. Wallace was accompanied by Paul Perito, Esq., who informed the Court that Mr. Wallace had asked him to be trial counsel for the defendant. He also stated, however, that he could not adequately prepare for a trial on November 4 and would need an additional three weeks because of the "complexity" of the case. The Court replied (R. 41-42):

"The fact of the matter is that when the jury disagreed, it was on, I don't know, the night of September 19th or when it was I took the disagreement. In any event, it was on September 19th; I was ready

to put this case down for immediate trial, retrial the following Monday.

I can't permit to go by one statement that you made, that Mr. Wallace made the other day, too, that this is a complex case. There may be 150 exhibits, if that is what you refer to. From where I sit, in terms of my experience, this is a very simple case for trial. The issues are very sharpcut. They are clearly defined, and I don't see it in terms of a complex case in any respect.

It is true there are a great number of exhibits in the case. That does not mean it is a complex case at all. It is a very simple case, and I am aware of your anxiety to get into the case.

I think the Court's commitments are such that I have to adhere to the date, and if your motion is to postpone the case, the motion is denied."

On October 29, 1974, the defendant petitioned this Court for a writ of mandamus and moved for a stay. This petition was summarily denied on October 30, 1974. A further application for a stay was made to the Supreme Court of the United States on November 1, 1974 and also was summarily denied.

On November 4, 1974, the trial commenced, with the defendant being represented by Fred Wallace, Esq. and Gary Naftalis, Esq. Before the empanelling of the jury, Mr. Naftalis asked the District Court for "a very brief continuance." (R. 56). This was denied, the District Court noting that Mr. Wallace had been in the case for five or six weeks and that the retrial would have commenced "within three or four days after the jury returned its disagreement" but for the conflicting schedules of the attorneys. (R. 62-63).

B. The Trial

1. Introduction

The Government proved that during the years 1967 through 1970, the defendant earned approximately $230,000 in taxable income from his illegal gambling business, and that he failed to pay a total tax due and owing of approximately $93,000. In addition, the Government demonstrated that the defendant was present when the tax returns were prepared and that he requested his former wife to sign his name to the returns, which reported total income of approximately $15,750 and a total tax of $2,850 during 1967-1970. The Government used the specific cash expenditure method of proof to establish the defendant's true income during the tax years in question.

2. The Government's Case

The Government's proof at trial showed that during the tax years in question, 1967 through 1970, the defendant had been engaged in a large-scale gambling enterprise in the New York City area and had accumulated large amounts of unreported income therefrom. (R. 106-107, 117, 134-135, 145, 284.) During this period, the defendant, in an effort to avoid detection of his illegal income, made various large expenditures and purchases by using his former wife, Rosalie Fisher, his parents, and his (then) girlfriend, Bernice Duncan, as nominees who actually expended the money and did the purchasing at his direction. (R. 134, 145, 152, 156, 162, 175, 381, 411, 438, 446.) On those occasions when the defendant himself made purchases, such expenditures invariably took the form of cash in order to avoid the existence of, or need for, any financial records (R. 371-372, 414-415, 472.)

The defendant's former wife, Rosalie Fisher, testified that from 1960 through 1969 "Mr. Fisher was a gambler in

Manhattan" and that she assisted him in this business (R. 106). She also testified that during this period she would collect the gambling revenues and deliver the money to various banks, using a shopping cart "because it was very heavy." (R. 108-109.) Rosalie Fisher's testimony concerning the defendant's gambling activities was not disputed and was, in fact, corroborated by the defendant himself, who had made various admissions about his gambling business during the course of his divorce proceeding in Nevada in 1972. These admissions were received in evidence. (R. 273-288, 713.) In that divorce proceeding, the defendant had stated under oath that he was "an illegitimate gambler" who, until approximately 1969, had been "one of the best" moneymakers around (R. 284.) The defendant added that in 1970 he had "to close down the business." (R. 284.) These admissions of the defendant were read to the jury without objection.

The Government also presented various witnesses who testified about the way in which the defendant spent this illegal income. Thus, Rosalie Fisher testified that she and her husband had purchased certain real estate holdings with "the gambling money." (R. 114-115.) She also stated that she had opened various checking and savings accounts in her name alone, using money that "came from gambling from Mr. Fisher." (R. 134.) She stated that during the years mentioned in the indictment she had no knowledge of the defendant having any savings or checking accounts of his own. (R. 132). In addition, she testified that at the defendant's instruction, she had placed a total of $75,000 in gambling income in a safe deposit box during the period from 1967-1970. (R. 145.) She further testified that the defendant "gave [her] the money to put in the checking accounts" and that she used these accounts to pay both her bills and those of the defendant. (R. 149, 152.) She described the various items she had purchased for her own benefit and for that of her former husband (R. 153-

174; 176-181). Most of the documentation concerning these purchases was placed in evidence without objection and was, in fact, agreed to by stipulation.

Testimony also was presented demonstrating that the defendant had constructed a $50,000 home in Englewood, New Jersey in 1967 for his girlfriend, Bernice Duncan, and their two children, using his elderly parents as the purported owners. The attorney who prepared the closing papers for the construction of the home testified that although the formal closing papers were in the name of the defendant's parents, he had always dealt with the defendant on all legal matters, adding that the defendant himself had requested that the papers reflect his parents as the owners. (R. 367.) The defendant, not his parents, made all the payments for the house in cash, including a payment of $16,650 delivered to the attorney "in a slightly torn brown paper bag." (R. 369, 371-372.) The defendant's parents were never present during these transactions. (R. 372.) In addition, whenever problems developed at the construction site, it was the defendant, not his parents, who complained to the attorney. (R. 377.) A subsequent deed, formally transferring the title of the property from the parents to the defendant, in trust for his two children, was drawn up at the suggestion of the defendant. (R. 378-379.) The defendant paid all the lawyer's fees in cash. (R. 381.)

The contractor who built the home also testified that he dealt only with the defendant or the defendant's realtor, and that he never discussed any construction problems with the defendant's parents. (R. 411.) All payments were made by the defendant, primarily in cash, including a $16,000 cash payment which the defendant delivered to the contractor at the realtor's office, and another of $13,880 made by the defendant at the job site. (R. 413-415.) The contractor never met the defendant's parents. (R. 420.)

Other witnesses testified about the manner in which the defendant transacted business. An interior decorator testified that the defendant and Bernice Duncan bought all the furniture for the New Jersey home, paying by either cash or certified check. (R. 432.) A swimming pool salesman testified that he dealt only with the defendant in the negotiations for construction of a swimming pool in the rear of the New Jersey home, and that he never met the defendant's parents. (R. 437-438.) The salesman testified that he delivered the contract to the defendant and returned "in a day or two", when one of the defendant's parents signed it. (R. 437-438.) A car salesman testified that he had sold a new Jaguar automobile to Bernice Duncan in 1970, although it was the defendant who had made the cash deposit. (R. 446.) Finally, a maid employed by the defendant in the New Jersey home testified that she never met the defendant's parents during the time she worked there and that she often saw large amounts of cash in the drawers throughout the house. (R. 471-472.)

Documents, admitted into evidence by stipulation, showed that although the purported owners of certain automobiles were Rosalie Fisher and Bernice Duncan, it was the defendant who had actually signed the purchase orders and made the payments. Thus, the defendant purchased a 1969 Cadillac for his former wife (R. 156), and a 1969 Mercury and 1970 Chrysler for Bernice Duncan. (R. 458.) In addition, documents were admitted into evidence showing that the defendant himself had purchased two new Cadillacs in 1968 and 1969, paying cash on both occasions. (R. 453.) The Government also read to the jury various portions of the transcript of the divorce proceedings in Nevada in 1972, at which time the defendant made highly damaging admissions concerning his responsibility for the construction of the New Jersey home (R. 278), his relationship to those persons living there (R. 276, 280),

and the fact that his parents were elderly and unemployed. (R. 279.)*

Finally, the Government presented testimony that, although the defendant had never signed any of the joint personal tax returns, he had instructed his wife to sign his name in his presence and had discussed with her the returns and what sources of income to include in answering the various questions in the returns. (R. 182-188.) Much of this testimony was corroborated by the defendant's accountant, who testified that he discussed the returns with both the defendant and his wife, and that he was told that the taxpayers often signed each other's signature. (R. 296-298.)

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* The divorce proceeding transcript also went a long way in eliminating the possibility that either the defendant's parents or Bernice Duncan were the true source of the income. Thus, not only did the defendant testify that his mother was 77 years old and his father 88, but, also, that he "helped in their support" because neither of them worked. (R. 279-284.) In addition, he testified that Bernice Duncan worked for him in the gambling business. (R. 285). The Government corroborated the financial dependence of Miss Duncan by placing into evidence Internal Revenue Service documents showing that she had not filed any tax returns during the years in question and a document from the Social Security Administration showing that no social security employment payments had been made by Miss Duncan during 1967-1970 (R. 462-463.) In addition, it was stipulated by both parties that the defendant's parents had, in fact, applied for Medicaid during the years in question. (R. 469.)

3. The Defense Case

Gilbert Fisher did not testify.

The defense case consisted entirely of the stipulated testimony of four witnesses. Thus, it was stipulated that if Eileen Page and Phyllis Lee were called as witnesses, "they would testify that Mr. Fisher, Gilbert Fisher, Jr., separated from his wife beginning in 1964, that is, his wife Rosalie Fisher, and that beginning in 1964, he resided at 470 Lenox Avenue and then at some later time in Englewood, New Jersey." (R. 453.) In addition, the testimony of Alfonso Butterfield, who testified at the first trial, was read to the jury. Butterfield, the safe deposit vault attendant at the bank where the Fishers maintained a safe deposit box, testified that the defendant's wife had first acquired the box in 1962, that she rented an additional box in 1964, and that, finally, in 1966, she rented a larger box because the other two were overflowing. (R. 546, 548-550). He further testified that the defendant did not gain access to any of the boxes until a power of attorney was executed in 1969. (R. 550).

The other stipulated testimony was that of Jane Foy, the defendant's 84 year old aunt, who had testified at the first trial. She testified that the defendant's father also was a gambler and that his father kept large sums of money in his bedroom closet. (R. 556-557). She also stated that he gave money to the defendant. (R. 557). She testified that the defendant's father and mother told her that they had paid for the construction of the house in New Jersey (R. 559-560).

ARGUMENT

POINT I

Rosalie Fisher was a competent witness at trial since the defendant had requested and received a final divorce from her in 1972; in any event, the finality of the divorce was not properly before the trial court.

Invoking the principle that a spouse is incompetent to testify against the other spouse during the course of the marriage, Fisher contends that the District Court erred in admitting the testimony of Rosalie Fisher. The defendant *concedes* that he initiated a divorce proceeding and was, in fact, granted a final decree of divorce in Nevada in 1972. He argues, however, that an appeal by Rosalie Fisher from the judgment of divorce is still pending and that therefore she was barred from testifying against him.

This argument is without merit and ignores both the facts of this case and the purpose underlying the rule. The record shows that at the time of trial *the defendant was married to Bernice Duncan, was living with her and their two children in Englewood, New Jersey, and had requested and received a final decree of divorce from Rosalie Fisher in 1972.* (R. 151, 276, 280, 283-284, 540, 599, 712). Accordingly, Rosalie Fisher was competent to testify against the defendant since she was no longer his spouse. *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Termini*, 267 F.2d 18, 20 (2d Cir.), *cert. denied*, 361 U.S. 822 (1959); *Volianitis* v. *Immigration and Naturalization Service*, 352 F.2d 766, 768 (9th Cir. 1965); *Barsky* v. *United States*, 339 F.2d 180, 182 (9th Cir. 1964).

Nor may the defendant realistically argue that the mere fact of a pending appeal from the final decree of divorce—an appeal taken by Rosalie Fisher and not the defendant—

barred her testimony at trial. The defendant offers no authority in support of his claim while there is case law to the contrary. See, *e.g., Hudson* v. *State,* 295 So. 2d 766, 769-770 (Miss. 1974); *Sullivan* v. *Commissioner of Internal Revenue,* 256 F.2d 664, 667-668 (4th Cir. 1958).

In *Hudson supra*, the Supreme Court of Mississippi held that a pending appeal from a final divorce decree, brought by the defendant husband who was charged with murder, did not bar the testimony of his former wife at the murder trial since "the appeal did not operate to restore the marital rights between the parties." 295 So. 2d at 770. And in *Sullivan, supra*, the Fourth Circuit held that a final decree of divorce barred a former spouse from filing a joint tax return, notwithstanding the fact that an appeal from the divorce decree was pending.

So, too, in the present case it is undisputed that a final, absolute decree of divorce was requested by the defendant in Nevada in 1972 and was so ordered by the Nevada Court. (R. 812) Indeed, as already indicated, the defendant has remarried and resides in Englewood, New Jersey with his wife Bernice Duncan and their two children.

In any event, it is clear that, on the facts of this case, it would be a gross perversion of the rule to allow the defendant to assert a claim that Rosalie Fisher was an incompetent witness. As already indicated, it was the defendant, not Rosalie Fisher, who sought and received a decree of divorce. At no time did *he* appeal the judgment; on the contrary, he fully accepted the decree and proceeded to marry Bernice Duncan. At the time of the trial, he was living with her and their two children. In addition, it was the defendant's own testimony in the divorce proceeding, read to the jury in the present case, that he had lived apart from his former wife *since 1964* and that there was "no chance of a reconciliation" with her (R. 283, 285.) In light of these facts, the defendant's argument is remarkably disingenuous. The reason underlying the invocation of the

rule prohibiting a spouse from testifying—to prevent marital discord—is totally absent in the present case. Accordingly, no purpose would be served here by applying the rule. *Cf. Lutwak* v. *United States*, 344 U.S. 604, 615 (1953); *United States* v. *Mackiewicz*, 401 F.2d 219 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968).

In addition, the defendant conveniently ignores the fact that at *no time during the first trial was any objection raised to the finality of the divorce.* At that time, the Government offered into evidence, without objection, the actual "final decree of divorce." (R. 812).

The frivolity of the defendant's argument in the second trial concerning Rosalie Fisher's competence to testify is highlighted by the last-minute nature of the claim. His initial motion to bar her testimony was made just prior to the empanelling of the jury. At that time Judge Weinfeld refused to consider the claim noting that the defendant was relying solely on the hearsay statements of a Nevada attorney (R. 68-69). At the close of the Government's case, the defendant renewed his argument and attempted to offer documentary evidence that an appeal was pending in Nevada (R. 539). At that time Judge Weinfeld stated that the issue had already been waived by the failure to object at the first trial and the untimely and insufficient objection made at the outset of the second. (R. 540-541). However, in addition, the District Court stated that, if the defendant so desired, he could place the documents in evidence (R. 540). The Court warned, however, that to do so would place before the jury the nature of the defendant's alleged current "bigamous relationship," and give the Government "an opportunity * * * to go into matters that I think they are precluded from going into now." (R. 540.) Defense counsel did not place the documentary evidence of an appeal from the divorce into evidence *and it still is not part of the record* in this case, although it is included in the appendix. (R. 705-706).

The rule that one spouse may not testify against another "is one of privilege, and the privilege may be waived." *Peek* v. *United States*, 321 F.2d 934, 943 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); *Olender* v. *United States*, 210 F.2d 795, 800 (9th Cir. 1954); *United States* v. *Levy*, 153 F.2d 995 (3d Cir. 1946); 8 Wigmore, *Evidence* § 2242, pp. 257-258 (3d Ed. 1961.) In the present case, not only did the defendant fail to offer *any* objection to Rosalie Fisher testifying at the first trial but, in addition, his subsequent objection at the second trial was made when the jury was about to be empanelled and without any proper evidentiary support. The District Court's action was, therefore, perfectly proper, and no error was committed in allowing Rosalie Fisher to testify.

POINT II

The refusal of the trial court to grant a continuance was proper.

The defendant contends that the trial court "abused its discretion" in refusing to grant his request for a continuance beyond the November 4th trial date. (Br. at 21-30.) This argument ignores the factual situation underlying the District Court's decision and is without merit.*

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* In arguing that the District Court abused its discretion in denying the application for a continuance, the defendant conspicuously fails to mention that he previously presented this argument to this Court on October 30, 1974 when he filed his petition for a writ of mandamus to compel the District Judge to grant the continuance. This Court summarily dismissed the petition, and the Supreme Court of the United States similarly refused the defendant's request for a stay. Since appellant has failed to adduce any new reasons to support this claim, the prior decision, as law of the case, forecloses renewal of the argument on this appeal. See *United States* v. *Fernandez*, Docket No. 74-1164 (2d Cir., November 6, 1974), slip op. 281 at 285-87.

On September 19th, following a hung jury in the first trial, Judge Weinfeld stated that he was prepared to retry the case "within three or four days thereafter." (R. 32-33.) Only at the request of defendant's trial counsel was the matter adjourned to November 4th. On at least three subsequent occasions, Judge Weinfeld expressly stated that the trial would proceed as scheduled on November 4th. (R. 10, 32-33, 41-42.) Thus, for example, on October 9th, almost a full month before the scheduled trial, the District Court informed the defendant that his decision to substitute attorneys could not "serve as an excuse to postpone the trial." (R. 10.) Furthermore, during the course of two pretrial conferences on October 21st and 25th, Judge Weinfeld, in response to the defendant's claim that the complex nature of the case compelled an adjournment, stated that the case was, in fact, "perfectly simple," as indeed it was. (R. 34, 41-42.)

Nor may the defendant argue that Judge Weinfeld's decision to refuse the continuance request was motivated by an alleged view that the defendant had not been convicted at the first trial, but should have been (Br. at 23-24.) The claim that the District Court was biased against the defendant not only finds absolutely no support in the record, but ignores the fact that at no time was any written motion, supported by a sufficient affidavit, under 28 U.S.C. § 144, filed by the defendant to disqualify the District Court Judge on the grounds of bias. The simple fact is that at the conclusion of the first trial, Judge Weinfeld expressed his displeasure in the jury's failure to reach a verdict, *whatever that verdict might be.* (R. 5-6.) The District Court certainly did not make "up its mind that the defendant (was) guilty." (Br. at 24.)

The matter of a continuance rests within the sound discretion of the trial judge. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *United States, ex rel. Lucas* v. *Regan*, 503 F.2d 1, 3 (2d Cir., 1974). A continuance in this case,

involving only a four-day trial in which the credibility of approximately six witnesses was the only real issue in dispute, would certainly have been unwarranted. The defendant's argument that this case involved "thousands of fiscal notations and transactions over a four year period, hundreds of interviews by multiple I.R.S. Agents, and dozens of prosecution witnesses" (Br., at 29), distorts the realities of the situation before the retrial. The great majority of the exhibits in this case were simply the financial records of the defendant and were introduced into evidence after the defendant *stipulated* as to their authenticity and voiced no objection to their admissibility. All of them had been introduced at the first trial and were made available to defense counsel for examination approximately one month before the second trial. (R. 19-28.) Under the circumstances the District Court properly exercised its discretion in denying the defendant's request for a continuance. *United States* v. *Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United States* v. *Marzec*, 249 F.2d 941 (7th Cir. 1957), *cert. denied*, 356 U.S. 913 (1958).

POINT III

The evidence of guilt was overwhelming.

The defendant maintains that the Government did not make out a *prima facie* case establishing that the defendant's parents, his former wife, Rosalie Fisher, and his present wife, Bernice Duncan, were making expenditures attributable to him. In addition, the defendant argues that the Government failed to provide a "reasonably certain opening net worth" for him and failed to eliminate the possibility of the existence of non-taxable sources of income. (Br. at 31-34.) These arguments are totally without merit and fly in the face of the overwhelming testimoney and documentary evidence presented below.

All of the Government's witnesses testified that the defendant was the actual purchaser and source of funds for the items and services formally bought by others. Thus, the defendant's former wife, Rosalie Fisher, testified that she had paid all of her bills and those of her husband's with the money he supplied her from his gambling business. There is absolutely no evidence in the record that either Rosalie Fisher or Bernice Duncan "were economically independent persons or entities." (Br. at 32.) To the contrary, not only did Mrs. Fisher testify that she was totally dependent on her husband for support, but the Government also offered proof at trial that Miss Duncan had not filed any tax returns during the years in question and had not paid any social security tax. Furthermore, the Government proved at trial that the defendant's parents were elderly and unable to support themselves. In addition, the Government offered the transcript of the divorce proceeding in 1972, in which the defendant himself testified that he was helping to support his parents, that his parents did not work, and that he was supporting Bernice Duncan and their two children in New Jersey. The Government also offered documentary evidence in the form of the various automobile invoices which demonstrated unequivocally that the defendant had been the true purchaser even though ownership nominally vested in either Rosalie Fisher or Bernice Duncan. Finally, both the attorney and contractor who built the house in New Jersey testified that they dealt only with the defendant.

Although the Government was not required to negate all possible sources of non-taxable income, *United States* v. *Massei*, 355 U.S. 595 (1958); *United States* v. *Calles*, 482 F.2d 1155, 1159 (5th Cir., 1973), notwithstanding the defendant's argument to the contrary, it also successfully eliminated the possibility of a claimed non-taxable source of income, specifically a "cash hoard" existing prior to 1967. In the first place, defendant relies solely on his vigorously disputed claim—totally unsubstantiated—that there existed prior to 1967 a "cash hoard" of $193,000 in a safety deposit box belonging to Rosalie Fisher. From this,

the defendant would deduce that *all* of the alleged expenditures made during the years in question came from this cash hoard. There are two answers to this. First, such a "cash hoard", even if in the possession of Rosalie Fisher, would not explain the money expended by the defendant in New Jersey in the construction of his home and the money he spent to support Bernice Duncan and their two children. Under the defendant's own theory, this money in the safety deposit box was retained by Rosalie Fisher and might account for her expenditures alone. But, even under the defendant's own theory of the case, none of the expenditures made in connection with the construction of the home in New Jersey and the purchases of automobiles and other items for Bernice Duncan and the defendant's two children could be attributed to this cash hoard. Second, the defendant made admissions in the 1972 divorce preceeding that as of that date *the $193,000 still existed* in Rosalie's safety deposit box. If that be the case, and this large sum remained intact as of 1972, it obviously could not be the source of any expenditures during the indictment years. In any event, the jury simply rejected the "cash hoard" claim.*

The defendant's claim that the Government did not satisfactorily establish his opening net worth reflects a misunderstanding of both the law and the facts in this case. The Government prosecuted this case on a cash expenditure theory, not a net worth theory. The key difference between the two methods was explained in *Taglianetti v. United States*, 398 F.2d 558, 562 (1st Cir., 1968):

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* It should only be noted that the defendant's unsupported claim that "the Government used cost of living and other average or arbitrarily assumed figures for expense" (Br., at 33), ignores the fact that the *defendant himself stipulated to the admissibility of these figures.* (R. 460).

> "The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailable against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year. The beginning and ending net worth positions must be identified with sufficient particularity to rule out or account for the use of a taxpayer's capital to pay for his purchases." [Footnotes omitted]

The Court of Appeals went on to explain that although precise figures for opening and closing net worth must be proved in a net worth case, "[*i*]*n a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof . . . makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures.*" *Taglianetti* v. *United States, supra,* 398 F.2d at 565. (emphasis supplied)

The First Circuit also carefully distinguished the cases upon which the defendant here relies. The Court of Appeals pointed out, for example, that in *Olinger* v. *Commissioner of Internal Revenue*, 234 F.2d 823 (5th Cir., 1956), the prosecution introduced *no proof* of net worth; and in *Dupree* v. *United States*, 218 F.2d 781 (5th Cir., 1955), "the prosecution had ignored considerable evidence of the existence of sources of available funds at the beginning of the taxable period." 398 F.2d at 565 n.7. These cases are similarly inapposite here.

The Government met its burden here by establishing that in 1967 Fisher had $30,000 in bank accounts in the name of his former wife and his two children by Bernice Duncan. Rosalie Fisher testified that as of January, 1967 this constituted all of the assets that the defendant and she possessed (R. 107). In addition, the Government relied on the *defendant's own admissions* in the 1972 divorce proceeding that, during the years in question, he had been "one of the best" money-makers around. (R. 284). In finding the defendant guilty, the jury obviously rejected the defendant's claim that he had amassed a "cash hoard" in the safe deposit box and concluded that, in any event, such a "cash hoard" would not explain in any way the expenditures made for the New Jersey house, and on behalf of Bernice Duncan and the two children. The record establishes beyond any reasonable doubt that the Government excluded the possibility that the expenditures were made from reported income or from assets Fisher had on hand at the commencement of the contested tax years.

POINT IV

The Government's evidence at trial was overwhelming and clearly demonstrated that the defendant had made various expenditures through designated nominees; in addition, the New Jersey trust was nothing but a sham concocted by the defendant to avoid detection of his income and clearly evidenced his wilful intent.

The defendant argues that the decision to place the New Jersey property in trust with his two children as beneficiaries was a perfectly valid, reasonable decision and must be presumed to be proper. Accordingly, the defendant maintains that expenditures for the New Jersey property cannot be attributable to him since the home was not in

his name. (Br. at 35-38.) This argument is completely without merit.

In the first place it is clear that the precise issue raised on this appeal by the defendant—whether or not the trust instrument should be presumed valid on its face—has absolutely nothing to do with the question of whether there was sufficient evidence showing that the expenditures made for the property were attributable to him. On the issue of whether he made the expenditures the evidence was overwhelming. Thus, the Government called as witnesses the lawyer who prepared the closing papers for the house in Englewood, New Jersey, the contractor who built the house, a swimming pool salesman who negotiated for the construction of a pool in the backyard of the house, and a furniture salesman who furnished the house. *All of these witnesses testified that they dealt only with the defendant and never with his parents* and that the defendant had made the bulk of the payments. For example, the lawyer testified that it was the defendant who made all the payments for title to the house and that the payments were primarily in cash. He further testified that it was always the defendant who voiced complaints during the course of the construction. The building contractor offered similar testimony that he had never dealt with the defendant's parents and had received some $30,000 in cash from the defendant. Thus, on the crucial issue of who made the expenditures, all the proof pointed to the defendant.

The Government's proof that the decision to place the New Jersey property in trust for the defendant's two children was merely a sham to avoid discovery of Fisher's true involvement, also was relevant to the issue of the defendant's wilful intent. Such intent can, of course, be inferred in a tax evasion case by a defendant's practice of placing his assets in the names of other persons. *United States* v. *Calles, supra; United States* v. *Holovachka,* 314 F.2d 345 (7th Cir.), *cert. denied,* 374 U.S. 809 (1963);

United States v. *Schipani*, 293 F. Supp. 156 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Thus, in the present case, the attorney testified that the trust instrument was drawn up specifically at the request of the defendant and not by his parents. Whatever presumption of validity, if any, the trust instrument may have for civil purposes, it is utterly preposterous for the defendant to assert, in light of all the testimony and documentary evidence, that the alleged facial regularity of the trust instrument precluded the Government from establishing that it was the defendant and no one else who made the expenditures for the house and used the trust as a means of concealment. It was for this very reason that the District Judge rejected this same argument below when, at the close of the Government's case, the defendant advanced it in support of his motion for a judgment of acquittal. (R. 536). Judge Weinfeld's response bears repetition here (R. 536-539):

> "Are you saying the legal documents are conclusive? Isn't that one of the issues of fact, whether this wasn't a device to cover up a source of income and couldn't it be even the very means of evading the payment of taxes by using the names of third parties, in this case, it was, it so happens it was the parents whose names were used?
>
> . . .
>
> Are you suggesting that a man who is charged has income can put property in the name of a third party and that this is conclusive that the property and the title to the property is that of the person who are the grantees under the deed and the man can use the names of third parties as the persons who enter into a contract, and it is beyond question on the part of the Government, to show what the true relationship is and isn't the evidence of the cash payments probative as to who actually was the party in interest?
>
> . . .

Acts and conduct, of course, may permit an inference.

In addition to that, there is evidence in the case, as I recall it, that the parents, who were quite advanced in years, to understate it, had no source of income.

There is also the testimony, as I recall it, of Mr. Fisher, Jr. in the Nevada proceedings which would throw a very serious doubt that the father had a nickel of income.

He even testified that he didn't know where he got the money from, which would knock out any claim which I suppose you are going to advance in this trial; it was advanced at the past trial, that the father had income as a gambler.

There is the defendant's own testimony in that case. That isn't to be overlooked.

There is the Medicare or Medicaid proof in the case, which in and of itself would suggest that he was without source of income.

Why isn't this an issue of fact as to whether or not the house, in fact, was his? Whether or not the money that was put up was his money and not the father's money?

On your theory, then, with due respect to you, that all a person need do to protect himself against a charge of this type is to use cash and have a third party become the contractee on its various obligations and if real property is involved, take the name of the real property in the names of third parties and if automobiles are bought, buy them in the name of third parties, and that isn't the law, and you know that as well as I do. (R. 536-39).

This issue of fact—whether the documents were merely a device to conceal the defendant's involvement and thus conceal his true income—was decided by the jury against the defendant and helped to establish the requisite element of wilfullness.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Kenneth R. Fernberg being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26th day of February, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Fred L. Wallace, Esq.
200 West 135th St. / Room 218
New York, New York 10030

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Kenneth R Fernberg

Sworn to before me this

26 day of February, 1975

Jeanette Ann Gratto

JEANETTE ANN GRATTO
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975